

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Investigation by the Department of Telecommunications and Energy on    )  
its own motion, pursuant to G.L. c. 159, §§ 12 and 16, into the regulations,) )  
practices, equipment, appliances, and service of Broadview Networks, Inc.) )  

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D.T.E. 02-14

**POST-HEARING BRIEF OF BROADVIEW NETWORKS, INC.**

Brad E. Mutschelknaus  
Kelley Drye & Warren LLP  
District of Columbia Bar No. 332262  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, D.C. 20036  
Tel. (202) 955-9600  
Fax. (202) 955-9792

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Broadview Networks, Inc. (“Broadview”) respectfully submits this Post-Hearing Brief in accordance with the bench ruling made by the hearing examiner in the above-captioned proceeding. Broadview’s submission of this brief is not intended to in any way to waive its claim that it has been denied procedural due process in the conduct of the proceeding to date.<sup>1</sup>

**Introduction**

In what is an amazing turn of events, the Department herein seeks to penalize Broadview for going to extraordinary lengths to prevent former Net2000 customers from losing service. Despite the fact that most affected customers are not customers of Broadview, the company has worked with former Net2000 customers to migrate them to alternative vendors and, remarkably, has subsidized their transition for nearly 6 weeks. Nevertheless, because Verizon refused to meet its obligations to process install orders, and some customers did not take reasonable actions

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<sup>1</sup> Broadview’s counsel objected at the opening of the public hearing, pointing out that Broadview had been given only one business day advance notice of the proceeding, and that its request for discovery of the identity of complainants giving rise to the proceeding had been denied. These actions of the Department of Telecommunications and Energy (“Department”) had the combined effect of: (i) preventing Broadview from collecting all relevant documentary evidence; (ii) preparing to meet the contentions of known accusers; (iii) calling or subpoenaing third party fact witnesses (*e.g.*, from Net2000, Cavalier, Verizon, and complaining Net2000 customers); and (iv) conducting discovery on the veracity of complaining Net2000 customers. The problem was compounded when the Department ordered parties to submit briefs less than 1-1/2 days following the close of the hearing. Broadview has been severely prejudiced in its ability to prepare its defense. By contrast, the Department failed to demonstrate why a short notice period is required in accordance with 220 CMR § 1.06(c) (which normally mandates at least 14 days prior notice). This rush to judgment, unfortunately, is more reflective of an “inquisition,” than an “investigation.”

to order substitute service, the Department now seeks to compel Broadview to extend its subsidy – unfairly, unlawfully, and at the peril of curtailment of its own services to Broadview customers.

### Factual Background

This story starts with the unfortunate demise of Net2000 Communications, Inc. (“Net2000”). Net2000 was a competitive local exchange carrier (“CLEC”) and a relative newcomer to the Massachusetts market. Although it recently deployed two switches in the Commonwealth, it had managed to garner only approximately 225 voice and data business customers there through the end of 2001. [Tr. 122-183] The recent financial travails of CLECs is well known by the Department, and Net2000 fell prey to them. When its lenders pulled the company’s financing, Net2000 was forced to file a petition seeking U.S. Bankruptcy Court protection in Delaware on November 16, 2001. [Tr. 55, Ex. DTE 2] It was immediately evident that Net2000 lacked the funding required for continued operation, and would have to sell its assets to satisfy the demands of creditors. [See Tr. 55]

Net2000, a Virginia-based company, which operated in many states, quickly struck a deal by which Cavalier Telephone, Inc. (“Cavalier”), another Virginia-based CLEC, and agreed to purchase all of its assets, including both “hard assets” such as switches and network equipment, as well as its customer base. [ Tr. 55-56, Ex. BV 10] In accordance with FCC rules, Net2000 sent notice of the impending sale to its entire customer base on December 17, 2001.<sup>2</sup> [Tr. 62-65, Ex. BV 1] Critically, the customer notification specifically forewarned recipients

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In accordance with the requirements of Section 214 of the Communications Act of 1934, as amended, and Section 63.71 of the FCC’s rules, 47 C.F.R. § 63.71, Net2000 filed with the FCC on December 6, 2001 an application for discontinuance of service, and notified its customers, including those in Massachusetts, on December 17, 2001. The FCC’s rules also required Net2000 to send a copy of this application to the Governor of Massachusetts, and to the Massachusetts DTE. 47 C.F.R. § 63.71(c). The FCC issued a Public Notice on December 19, 2001, notifying the public that Net2000 proposed to discontinue service to its  
(continued...)

that plans could change and there was a possibility that “*Net2000 will be required to simply terminate service without transferring customer accounts.*” [Tr. 62-65, Ex. BV 1]

Thereafter, the Bankruptcy Court entered an order pursuant to Section 363 of the U.S. Bankruptcy Code ordering Net2000 to sell its assets to Cavalier. [See Tr. 55] The asset sale presented an unusual dilemma, however, because Cavalier was not licensed to provide telecommunications services in several of the many states where Net2000 operated, including Massachusetts. [See Tr. 60] For reasons unknown, Cavalier opted not to apply for certification in those states, and did not seek to have Net2000’s certificates transferred. Moreover, in what must have been a surprise for all involved, Cavalier was unsuccessful in attempts to sell the Net2000 customer accounts in those states to another licensed carrier.

With time running short, Broadview<sup>3</sup> expressed an interest in purchasing the Net2000 switches located in Massachusetts. [See Tr. 56] Broadview had a near term need for such switching equipment to accommodate its own internal growth. [Tr. 57-59] The company’s plan

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customers, pursuant to a sale of assets, “including all of its customer accounts,” to Cavalier Telephone, LLC. See Comments Invited on Net2000 Communications Services, Inc. Application to Discontinue Domestic Telecommunications Services, NSD File No. W-P-D-550, DA 01-2971 (December 19, 2001) (“December 19 FCC Public Notice”). Pursuant to the FCC’s rules, interested parties were given the opportunity to file objections to the application within 15 days of receipt of notice. Net2000’s application for discontinuance of service to its customers in Massachusetts and elsewhere was automatically granted on the 31st day from the date of the public notice, on or about January 18, 2002. See 47 C.F.R. § 63.71(c).

<sup>3</sup> Like Net2000 and Cavalier, Broadview is a relatively newly-formed CLEC. Unlike Cavalier, Broadview is licensed to provide local and long distance telecommunications services in Massachusetts. [See Tr. 54]

was to purchase the two switches from Cavalier, decommission them, and redeploy them elsewhere within the existing Broadview network. [Tr. 57-59, Tr. 129]

Broadview was not interested in acquiring the former Net2000 customer base. [See Tr. 59-60] However, Broadview agreed to purchase a simple subscriber list of former Net2000 customers from Cavalier, so that it could attempt to sell Broadview's own telecommunications services directly to Net2000 customers. [See Tr. 60] Cavalier purchased Net2000's Massachusetts-based equipment and all of its customer accounts on January 21, 2002 in accordance with the Bankruptcy Court's orders. [Tr. 55; Ex. BV 10] Cavalier then immediately resold the former Net2000 equipment and subscriber list to Broadview, *but did not sell or transfer the Net2000/Cavalier customer accounts*. [Tr. 566] Cavalier remains the owner of all of the former Net2000 customer accounts in Massachusetts.

Operation of the legacy Net2000 network is very expensive, costing Broadview approximately \$1.2 - \$1.7 million monthly. [Tr. 111, Tr. 117] Although Broadview had no customers of its own on the legacy Net2000 network, the company realized that a reasonable course of action would be to leave the network operational for a temporary period, and notify affected customers of the need to select replacement service. Broadview decided to subsidize operation of the network through February 25, 2002, despite the fact that it would not be able to recoup the nearly \$1 million in costs incurred thereby.<sup>4</sup> Broadview knew that 6 weeks of subsidized operations was the very limit of what it could afford, and immediately set about notifying customers of the need to change service providers.

Broadview sent some customers a notice on January 11, 2002. That notice announced in boldface type that it was an **"Important Notice About Your Net2000 Services: Your Action**

**Required!”** [Ex. BV 2] After informing customers that Cavalier had dropped out of the picture, the notice went on in boldface type to forewarn customers that: **“In order to ensure that you stay connected, you must sign a new service agreement to transfer your service to Broadview Networks. You should do this quickly in order to avoid interruption or loss of service.”** [Tr. 65-68, Ex. BV 2] Other customers were notified by letter dated January 16, 2002, again in boldface type, that: **“Your action is required. You must select a new local and long distance telecommunications provider as soon as possible and transfer your service to a new provider by February 21, 2002.”** [Tr. 80, Ex. BV 3] Still other customers received correspondence from Broadview dated January 25, 2002, which was legended in boldface type **“Urgent Notice about your Net2000 Service: Your immediate action required!** [Ex. BV 4] That notice warned customers, again in boldface, **“you must act immediately by making permanent arrangements with Broadview Networks or another carrier. Otherwise, you will face interruption of your service by February 25, 2002.”** [Tr. 86, Ex. BV 4] Finally, during the period January 25, 2002 to January 29, 2002, Broadview attempted to contact every Net2000 customer by telephone to inform them of the imminent discontinuance deadline, and to urge them to order replacement service. [Tr. 88]

The 4-6 weeks advance notice was sufficient lead time for customers to obtain installation of substitute services. [See Tr. 95] Indeed, Broadview’s Chief Operating Officer testified that a period of less than 2 weeks is adequate if orders are worked diligently. [Tr. 198] That is especially the case where, as here, existing Verizon loop facilities serving customers simply needs to be reassigned, and construction of few, if any, new loops is required. [Tr. 93-94]

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Recall that Broadview lacks service agreements with the customers connected to the Net2000 network and thus, both billing and collection are unlikely, [Tr. 61-62].

Unfortunately, Broadview did not anticipate that it would become an unwitting pawn in a larger fight between Verizon and Cavalier -- in which Verizon was attempting to extort payment from Cavalier for pre-petition Net2000 services and service disconnection charges.

Without belaboring the matter, Verizon apparently is attempting to force Cavalier to reimburse it for unpaid pre-petition debts incurred by Net2000, as well as certain service termination charges under the Net2000 agreements. [See Tr. 90] As bargaining leverage, Verizon chose to hold service orders affecting the legacy Net2000 customers hostage, and refused to process many such orders in a timely manner. [See Tr. 89-90] The most common excuse raised by Verizon was that there were “no facilities available” for use in filling orders for replacement service because Net2000 had not released the facilities in question. [Tr. 89-90] As was demonstrated at hearing, this contention was patently incorrect, and was asserted despite the fact that Net2000 notified Verizon on January 18, 2002, that it decided to discontinue all services purchased from Verizon immediately. [Tr. 97-100, Tr. 103-105, Ex. BV 5; *see also* Tr. 47, Ex. BV 6] Nevertheless, until it altered its position at the hearing in this matter, [Tr. 48, Tr. 198], Verizon continued for a critical period of more than a month to stonewall legitimate efforts by Broadview and other vendors to provision services to the legacy Net2000 customer base. [Tr. 104-105]

Due in large measure to Verizon’s refusal to cooperate in the transition, some customers were unable to obtain promised installation dates that preceded Broadview’s planned Net2000 network shutdown date of February 25, 2002. Although the number of customers that face a possible loss of service is not clear,<sup>5</sup> only 8 such customers<sup>6</sup> identified themselves at the public

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<sup>5</sup> The total number of Net2000 customers in Massachusetts was approximately 225. However, many either disconnected previously, were long distance customers, or were served on a “total service resale” basis. Since these customers are not directly connected to the former Net2000 switches, none of them are faced  
(continued...)

hearing as having a continuing problem in obtaining replacement service prior to the anticipated cut-off date.<sup>7</sup> However, at the hearing, representatives of Broadview and Verizon made a new commitment to work together to get all affected customers turned up for new service on an expedited basis. Verizon stated that it would henceforth waive its prior objection to processing many of the orders, and would dedicate a team to installing the remaining customers within 2 weeks. [Tr. 198] Correspondingly, Broadview offered to keep the legacy Net2000 network operational through February 28, 2002, extending the lead time available for conversion to 9 days. [Tr. 193-195]

Broadview demonstrated that keeping the legacy Net2000 network operational beyond the end of February is not feasible. From a technical perspective, Broadview demonstrated that numerous vendors<sup>8</sup> provide critical services to the legacy Net2000 network. [Tr. 60-61, Tr. 106-115] If any of them were to cease providing service, the network would be effectively shutdown. [Tr. 106-115] Many of them have been threatening to cut off service since late January. [Tr. 60-61, Tr. 113, Ex. BV 9] These vendors agreed to assist with the transition through February 25, 2002, but can be expected to act on their threat to cut service without warning at any point after February 25. [Tr. 60, Tr. 107-109] Thus, continued operation of the network beyond the end of February is not controlled solely by Broadview. [Tr. 106] Broadview can delay

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with a service termination due to the local network shutdown. Thus, it is estimated that no more than 50 customers could face continuing provisioning problems. [Tr. 182-183]

<sup>6</sup> Samuel Rotondi [Tr. 11], Communications and Power Industries [Tr. 18], Source One Financial [Tr. 18], Suburban Staffing, Inc. [Tr. 24], Silverstream Software [Tr. 27], Rietzl Porsche/Audi [Tr. 32], J.D. Daddario Company [Tr. 34], and MediQual Systems [Tr. 40].

<sup>7</sup> It is noteworthy that Department's *Notice of Investigation* initiating this proceeding on February 14, 2002 indicated that medical centers and nursing homes were served by Net2000 switches, but no such customers appeared. Thus, the record indicates that they, like most customers, encountered no insurmountable problem in arranging replacement services, and that the *Notice* was somewhat misleading.



decommissioning the Net2000 switches, but if other vendors discontinue their services as threatened, then the network will shut down anyway. [Tr. 60, Tr. 106]

Similarly, Broadview demonstrated that its continued operation of the legacy Net2000 network is not financially feasible. The continuing cost of operating the network is estimated in the range of \$1.2 to \$1.7 monthly. [Tr. 117] Like most CLECs, Broadview operates at a loss and has very limited access to capital. [Tr. 117-118] Although its current business plan is funded, it does not have adequate spare cash to subsidize an extension of the network transition period. [Tr. 118] Thus, if ordered to continue operating the Net2000 network, Broadview likely would be forced to curtail existing services to its own customers and/or lay off employees in Massachusetts. [Tr. 119, Tr. 192-193] In addition, the additional operating expense could place Broadview in breach of covenants made to lenders in existing credit facilities, thereby placing its existing financing – and thus the company – in jeopardy. [Tr. 192-193]

Finally, it would not be possible to recover these additional operating costs from Net2000 customers. Even at its peak of 225 customers, Net2000's customer base in Massachusetts produced only approximately \$150,000 in monthly revenue, perhaps partly explaining the company's descent into bankruptcy. [Tr. 189-191] Worse yet, Broadview has succeeded in convincing only 17 of the former Net2000 customers to sign service agreements with it. [Tr. 126] Estimated monthly revenue from these customers is approximately \$20,000. (Tr. 189-191] The company believes that it is unlikely to be able to collect for services rendered to the customers that have not signed up for Broadview services. [Tr. 61-62] Thus, *less than 2% of the cost of operating the Net2000 network is reasonably recoverable from customers.*

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There are at least 13 critical vendors to the former Net2000 network, including Verizon, WorldCom, UUNet, Dominion, Illuminet, Level 3, Global Crossing, SNET and Savvis. [Tr. 106-115]

**I. BROADVIEW CANNOT BE RESPONSIBLE FOR PROVIDING SERVICE TO CUSTOMERS THAT HAVE NOT SUBSCRIBED TO BROADVIEW SERVICE OFFERINGS**

Broadview does not own the legacy Net2000 customer accounts in Massachusetts.

[Tr. 56] The non-equipment-related assets purchased by Broadview from Cavalier are strictly limited to a simple list of the Net2000 subscribers, and a right to solicit their business. [Tr. 56, Tr. 60] As a matter of contract and common carrier law, Broadview's service obligation is limited to those customers that have ordered its service. Indeed, if Broadview attempted to provide (and bill for) services to customers that did not order its services, it undoubtedly would be accused of engaging in unlawful "slamming." *See* G.L. c. 93, § 108 *et seq.*; 220 CMR § 13.00 *et seq.*

Of the 8 public witnesses who petitioned the Department to intervene, only 1 has ordered service from Broadview.<sup>9</sup> Broadview acknowledges its responsibility to expedite its order from that single customer as diligently as possible, and has agreed to assist customers that selected other vendors as well. However, the Department cannot reasonably order Broadview to provide free services to customers that have not ordered service from it. As a legal matter, Broadview is only responsible to customers that have "requested" service from it, and its accusers simply have not. Broadview purchased two switches, not customer accounts, from Cavalier, and the Department cannot now amend the parties' bargain to add the legacy Net2000 customers to the deal.<sup>10</sup>

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<sup>9</sup> Mr. Rotondi. [Tr. 11]

<sup>10</sup> Broadview respectfully submits that it is Cavalier -- the owner of the Net2000 accounts in Massachusetts -- that is ultimately responsible to the Net2000 customer base that it purchased. Broadview remains  
(continued...)

## II. BROADVIEW HAS STRICTLY COMPLIED WITH ALL APPLICABLE MASSACHUSETTS STATUTES AND DEPARTMENT RULES

Even assuming *arguendo* that Broadview somehow acquired the Net2000 customer base, the Commonwealth has rules that apply, and Broadview has complied with them. According to the Massachusetts Attorney General, as explained in its *Memorandum* in a recent bankruptcy proceeding, the only Department requirement for the discontinuance of service by carriers that provide local telephone service is that they provide 30 days advance notice to the Department itself and to affected consumers. As explained by the Attorney General therein:

In Massachusetts, carriers that provide local telephone service are regulated by the Massachusetts Department of Telecommunications and Energy (DTE). As a matter of common practice of the DTE, DTE requests that a local service carrier provide notice to it 30 days in advance of terminating local telephone service to consumers, and requires that local service carriers provide 30 days notice to consumers. See also G.L. c. 159, § 19 which requires that every local service carrier provide 30 days notice to DTE before any changes may be made to contracts between carriers and their customers.

*Memorandum of the Commonwealth of Massachusetts in Support of its Limited Objection to Debtor's Emergency Motion to Sell Assets by Private Sale Free and Clear of Liens, Claims and Encumbrances*, In re: Essential.Com, Inc., Debtor, Case No. 0115339-WCH, U.S. Bankruptcy Court for the Dist. of Mass. (Eastern Div.) (August 7, 2001) ("*Memorandum*") (appended hereto as Attachment 1), at page 4.<sup>11</sup>

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perplexed at why it is being investigated for agreeing simply to assist in providing a reasonable transition. Service to this customer base already was legally discontinued -- with proper notice -- by Net2000.

<sup>11</sup> All of Net2000's former customers are non-residential, business customers. Therefore, the Department's rules for residential customers do not apply. However, even under the Department's relatively stricter rules for residential service, a telephone company need only provide notice of discontinuance by U.S. first class  
(continued...)

Even more pertinent to the present situation, the Attorney General has stated that a carrier that *acquires* local telephone service customers in Massachusetts are not required to provide *any* notice to affected customers. As the Attorney General stated in its *Memorandum*, after referring to FCC requirements providing that acquiring carriers provide advance notice of a transfer of long distance telephone service customers:

There are no similar provisions in [Massachusetts] state law covering any notice that should be provided by an acquiring company to [the bankrupt company's] customers relative to local telephone service.

*Memorandum* at 5. There is no question that Net2000, Cavalier and Broadview complied with all applicable FCC requirements. Pursuant to these requirements, the customers in question were provided notice of discontinuance on December 17, 2001, and copies of Net2000's application for discontinuance were also sent to the Department and to the Governor of Massachusetts. This "round" of notices was completed before Broadview, and its offer to purchase the two Massachusetts switches, was even in the picture. Net2000's discontinuance application before the FCC was automatically approved on or about January 18, 2002, *three days before Cavalier purchased Net2000's assets in bankruptcy (see n. 2, supra)*, legally entitling Net2000 to discontinue service to its customers in Massachusetts.

There also is no dispute that Broadview itself provided at least *another* 30 days advance notice of the proposed discontinuance to consumers, [Ex. BV 2, Ex. BV 4] and the Department.<sup>12</sup>

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mail sent 15 days prior to the date of the proposed discontinuance. *See Rules and Practices Relating to Telephone Service to Residential Customers*, Part 5, Rule 5.4. (In fact, since the rules specify that the service of notice is deemed complete upon mailing, in most cases the customer would receive considerably less than 15 days' notice of the discontinuance. *Id.* )

<sup>12</sup> By correspondence dated January 22, 2002, Broadview notified the Department that it had acquired the right to solicit Net2000's Massachusetts customers, but had not acquired the customer base.

Therefore, even disregarding the fact that the discontinuance of service was essentially a *fait accompli* before Broadview even took possession of the switches, pursuant to the Attorney General's own statement of the applicable law in Massachusetts, Broadview has complied with all existing requirements *and more*.

### **III. BROADVIEW ACTED REASONABLY AND RESPONSIBLY TO PROVIDE A TRANSITION PERIOD AND ADVANCE NOTICE OF THE DISCONTINUANCE**

Despite the fact that it never acquired the Net2000 customer base, Broadview already has gone to great lengths to accommodate the legitimate need of affected customers for a reasonable transition period. First and foremost, Broadview elected in its own discretion to keep the legacy Net2000 network operational from the date that it acquired the switches – January 21, 2002 – to February 25, 2002 – a period of *over 4 weeks* after Cavalier purchased the Net2000 assets. As a result of this decision, Broadview was forced to absorb approximately \$1 million in expenses for the transition period that are largely unrecoverable. [See Tr. 189-191] Broadview had no legal obligation to subsidize such a transition period, but Broadview decided to do so out of a sense of corporate responsibility towards the affected customers and communities in which they are located. [Tr. 194-195] Critical to that determination is the un rebutted testimony that the normal timeline for a T1 installation does not exceed approximately 4 weeks, and that expedited mass migration can be completed in less than 2 weeks. [Tr. 95, Tr. 131, Tr. 194, Tr. 198]

Given the reasonably anticipated installation lead time of no more than 2-4 weeks, customers were given ample notice of the possible discontinuance and the need to act quickly to order replacement service from Broadview or another vendor. Specifically:

- \* Net2000 warned customers in writing on December 17, 2001 that service could “terminate” due to its bankrupt condition. [Ex. BV 1]

- \* Broadview and Cavalier notified customers in writing on January 11, 2002, that they needed to order replacement service immediately “to avoid interruption or loss of service.” [Ex. BV 2]
- \* Net2000 notified customers in writing on January 16, 2002 that they had to transfer service to a new provider by February 21, 2002. [Ex. BV 3]
- \* During January 25 - 29, 2002, Broadview attempted to contact every Net2000 customer by telephone to inform them of the February 25, 2002 shut down date, and urge them to order substitute service immediately. [Tr. 88]
- \* Broadview sent written notice on January 25, 2002 that customers needed to “act immediately” to order replacement service or “face interruption of your service by February 25, 2002.” [Ex. BV 4]

Although it is conceivable that a customer could have been confused by any one of those communications, it is evident that the combined notification campaign made clear to all affected customers by no later than January 25, 2002 (and in many cases, earlier) that they needed to act immediately to order substitute service. The effective notice period of between 10 weeks (December 17 to February 25) and 4 weeks (January 25 to February 25) was eminently reasonable given Broadview’s informed expectation that installation could be completed within 2-4 weeks if necessary.

#### **IV. BROADVIEW CANNOT BE HELD ACCOUNTABLE FOR VERIZON’S REFUSAL TO HONOR VALID SERVICE ORDERS**

Broadview reasonably anticipated, based upon its extensive experience ordering service as a CLEC, that Verizon would reassign existing Net2000 loops used by affected customers to permit installation of replacement services within 2-4 weeks. [See Tr. 95] Unfortunately, Verizon deliberately chose not to do so. Verizon instead seized an opportunity to use its bottleneck position in the provisioning process to attempt to extract payment of disputed amounts from Cavalier. [See Tr. 103-105] By claiming falsely that there were “no facilities

available,”<sup>13</sup> Verizon unreasonably delayed the installation of replacement services, and caused some customers to obtain due dates after the planned February 25 network shutdown.

Broadview does not desire to comment on the merits of the ongoing collections dispute between Verizon and Cavalier. However, regardless of the merits of that controversy, Broadview certainly cannot be held accountable for not having anticipated it. Even more to the point, Broadview cannot have been expected to forecast that Verizon would deliberately ignore Net2000’s express discontinuance notice, and take the unsupportable position that there were “no facilities available” (this paradoxically includes the facilities that the customers in question were *already using*) for replacement carriers to use in serving the former Net2000 customers.

## **V. CONTINUED OPERATION OF THE LEGACY NET2000 NETWORK IS NEITHER TECHNICALLY OR FINANCIALLY FEASIBLE**

As was discussed in the recitation of the factual background above, Broadview does not have exclusive control over operation of the Net2000 network. Numerous vendors – such as Verizon, WorldCom, UUNet and Global Crossing – provide network services that are crucial to the continued functioning of the network. [Tr. 60] Any one of these vendors can effectively disrupt the network by withholding their services, which some already have threatened to do. [Tr. 60-61] Broadview anticipates that one or more such vendors is in fact likely to withhold services after February 25, 2002. [Tr. 60, Tr. 106-115] Thus, even if Broadview does not decommission the Net2000 switches, the network could be effectively shutdown at any time for reasons beyond the reasonable control of Broadview. [See Tr. 60-61] Clearly, it would be both unreasonable and futile for the Department to order Broadview to take action that it cannot

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<sup>13</sup> Verizon claimed that the facilities in question had not been released by Net2000, when in fact Net2000 had formally notified Verizon on January 18, 2002 of its desire to discontinue all Verizon services immediately. [Tr. 47, Tr. 88-90, TR. 97-100, Ex. BV 5]

accomplish unilaterally, and is beyond its reasonable control.

In addition, continued operation of the Net2000 network simply is not financially feasible. As again was covered in the factual background section, continued operation of the legacy Net2000 network would cost Broadview approximately \$1.2 - \$1.7 million monthly. [Tr. 117] Only a minuscule portion of this expense – approximately \$20,000 monthly – is recoverable from customers. [Tr. 189-191] Broadview is not financially capable of covering these expenses. [Tr. 118-119, Tr. 192-194] The company is a start-up CLEC that is not yet profitable, and has very limited access to capital. [Record Request DTE 4; Tr. 118] Although its present business plan is fully funded, Broadview has no spare or unallocated cash. [Tr. 118-119, Tr. 192-193] Thus, any funds used to operate the Net2000 network could be obtained only by curtailing existing Broadview services and/or laying off employees. [Tr. 119, Tr. 192-193] Worse yet, the unbudgeted expenses could place Broadview in breach of its loan covenants, putting the company at peril of losing its existing financing. [Tr. 192-193] Thus, the unrebutted evidence at hearing demonstrates that Broadview lacks the financial ability to comply with an order to operate the Net2000 network significantly past the planned February 25, 2002 shutdown date.

Chapter 159, Section 16 of the General Laws of Massachusetts specifically requires that, before the Department takes action to modify the rates or practices of a common carrier such as Broadview, it must take into account that carrier's financial ability to comply with the Department's order, and weigh that against the necessity of issuing the order:

Before making such order, the department shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the



carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the department of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public.

G.L. c. 159, § 16. In this case, if the Department orders Broadview to continue to provide service to the affected customers without any means to be compensated for its services, the Department simply shifts the burden and expense of the transition away from the customers themselves and the undisputed owner of the customer accounts (*i.e.* Cavalier) to Broadview, a carrier that lacks the legal obligation, lacks the contractual privity and, perhaps most importantly, lacks the customer's express permission, to provide service. Broadview can ill afford to carry this burden, which never was its responsibility.

## **VI. ANY REQUIREMENT TO CONTINUE OPERATING THE NET2000 NETWORK WOULD CONSTITUTE AN UNLAWFUL "TAKING"**

Broadview acquired the Net2000 switches because it had need of them in its own network. [Tr. 56-59] The company planned to decommission them, disassemble parts, and redeploy the components to accommodate its internal growth. [Tr. 57-58] Any order of the Department that delays Broadview's intended use of the network equipment that it acquired from Cavalier exceeds permissible regulation and constitutes a *per se* taking of Broadview's property. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The U.S. Supreme Court has made clear that "when the 'character of the governmental action' is a permanent physical occupation of the property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*, at 434-435; *see also, e.g., McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13 n.7 (1<sup>st</sup> Cir. 1993); *Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications and Energy*, Civ. Action No.

00-4909-A, 24 CR (P&F) 462, n. 2 (Ma. Sup. Ct., Suffolk Cnty., July 27, 2001) (rejecting DTE argument that no taking had occurred based on the efficacy of the challenged regulation and importance of its public purpose). Importantly, the Supreme Court also has ruled that “temporary takings” are not different in kind from permanent takings, and cannot be undertaken without just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987).

It is clear that the costs of continued operation of the network cannot be recovered from customers. [Tr. 189-191] Thus, an order requiring Broadview to continue operation of the network for the benefit of Cavalier’s customers would constitute an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution and Article 10 of the Declaration of Rights of the Massachusetts Constitution.

## **VII. THE DEPARTMENT CAN PROTECT CONSUMERS BY ORDERING VERIZON TO EXPEDITE INSTALLATION**

Importantly, there is a far less intrusive and onerous solution available to the Department than ordering Broadview to delay the shutdown of the Net2000 network. Broadview offered at the hearing to leave the network operational through February 28, 2002. [Tr. 193-195] Broadview’s un rebutted testimony is that, provided that Broadview and Verizon work together diligently, all customers that have complained can be installed on or before that date if Verizon expedites processing of the pending orders. [Tr. 194] That is a simple, easy, inexpensive and elegant solution that keeps customers in service without unduly burdening either Broadview or Verizon. Broadview respectfully urges the Department to take this alternative action to address the concerns raised by customers at the public hearing.

### Conclusion

The record herein cannot support a finding that the practices of Broadview are unjust, unreasonable, unsafe, improper or inadequate. G.L. c. 159 § 16. The unrebutted evidence adduced at hearing shows that Broadview has complied with all applicable rules, that Broadview acted reasonably in managing a transition period, that there is no necessity for taking action, that Broadview is financially unable to continue operating the Net2000 network, and that any such order will unduly interfere with Broadview's ability to serve its own customers in Massachusetts. *See id.* Thus, the Department cannot and should not take any further action herein.

Respectfully submitted,

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Brad E. Mutschelknaus  
KELLEY DRYE & WARREN LLP  
District of Columbia Bar No. 332262  
1200 19<sup>th</sup> Street, N.W.  
Suite 500  
Washington, D.C. 20036  
Tel. (202) 955-9600

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# **ATTACHMENT 1**

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